

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Petition for Waiver of Pricing Flexibility) WCB Docket No. 04-246
Rules for Fast Packet Services)

**COMMENTS OF SBC COMMUNICATIONS INC IN SUPPORT OF VERIZON’S PETITION FOR
WAIVER**

SBC Communications Inc. (“SBC”) hereby files these comments in support of Verizon’s Petition For Waiver of Section 69.729 of the Commission’s rules and paragraph 173 of the *Pricing Flexibility Order* to permit Verizon to take advantage of pricing flexibility for its advanced services in areas where Verizon has received pricing flexibility for special access services.¹

SBC is in a similar situation with respect to its advanced services offered through its local telephone exchange companies. Currently, SBC’s ILECs offer two advanced services that rely on packetized technology, BPON² and OPT-E-MANSM. Like Verizon’s advanced services, these services are outside of price caps, thus SBC, absent a waiver, is required to make a cost support showing anytime it makes changes to the rates, terms and conditions for these services and must file such revisions on 15-days notice. Such requirements seriously disadvantage SBC by virtually eliminating their ability to respond quickly to changing market conditions and customer needs, or compete effectively on price with competitive broadband providers, many of which are not subject to such onerous requirements.

To remedy these unintended consequences for its ILEC advanced services, SBC filed a petition last December seeking a waiver of the Commission’s price cap rules to allow SBC to include BPON and OPT-E-MANSM in price caps so that it could avail itself of the pricing

¹ Verizon Petition for Waiver to Allow it to Exercise Pricing Flexibility for Advanced Services Where the Commission has Granted Relief for Traditional Special Access Services, WCB Docket No. 04-246 (2004).

² BPON currently is only offered by Pacific Bell.

flexibility available for price cap services.³ As SBC stated therein, advanced services are highly competitive and thus should be entitled to the greatest degree of pricing flexibility. Cable operators not only currently dominate the provision of mass-market broadband services, as the Commission has in fact recognized, but also small business broadband services.⁴ For the larger business markets, the major IXC's (AT&T, WorldCom and Sprint) are the dominant providers of advanced services and collectively account for two thirds of this market in SBC's region.⁵ ILECs are thus only a subset of many providers attempting to compete in the robustly competitive broadband market. Advanced services generally are more competitive than traditional special access services, and therefore should not receive less pricing flexibility in markets where such pricing relief has been granted. However, without a waiver of the price cap rules, that is exactly the result.

Verizon, like SBC, seeks the greatest degree of pricing flexibility for its advanced services that rely on packetized technology and indeed its approach to achieve pricing flexibility for these services may be the better approach. It would enable Verizon to avoid the costs and burdens associated with incorporating its broadband services under price caps and then seeking pricing flexibility relief for such services. To the extent the Commission grants Verizon's request, the same relief should be extended to all dominant LECs offering advanced services that rely on packetized technology.⁶ In this event, SBC would withdraw its pending price cap waiver.

³ SBC Communications Petition for Waiver (filed Dec. 9, 2003) (SBC Petition).

⁴ Reply Comments of SBC Communications Inc. at 11-12.

⁵ *Id.*

⁶ The Commission took a similar approach in the local number portability context. BellSouth filed a petition for declaratory ruling and/or waiver requesting that the Commission issue a declaratory ruling that wireline carriers are entitled to a reasonable opportunity to recover their costs of implementing intermodal LNP. BellSouth Petition, CC Docket No. 95-116 (Nov. 14, 2003). The Commission granted the request and extended the waiver to all carriers to recover costs that they incurred to implement intermodal number portability. BellSouth Corp. Petition for Declaratory Ruling and/or Waiver, CC 95-116, Order, 19 FCC Rcd 6800 (2004). Here, SBC and other ILECs that have not included their advanced services under price caps are similarly situated with Verizon and thus are entitled to the same degree of pricing flexibility relief.

SBC agrees that there is good cause for a waiver here. Section 1.3 of the Commission's rules permits the Commission to grant waivers for "good cause shown."⁷ The courts have interpreted this rule to require the petitioner to show that "special circumstances" warrant such relief and that "granting such relief would not undermine the underlying purpose of the rule in question and would better serve the public interest than insisting on strict compliance."⁸

The Commission currently is evaluating the appropriate regulatory treatment for broadband telecommunications services provided by dominant LECs. In its orders granting Verizon a waiver of Section 61.42(g), the Bureau properly recognized that the Commission may ultimately find that broadband services should be deregulated,⁹ which would entitle these services to the greatest degree of pricing flexibility. Due to the pendency of that proceeding and the fact that Verizon had not factored its advanced services into its price cap indexes and price cap rates, the Bureau concluded that there was good cause to waive Section 61.42(g).¹⁰ This was the right outcome, but unfortunately left Verizon's advanced services in a regulatory state wherein they are subject to even greater regulation than price cap services.

A waiver here would correct this unintended consequence. Indeed, the same circumstances that warranted a waiver of Section 61.42(g) justify a waiver of Section 69.729 and paragraph 173 of the *Pricing Flexibility Order*. It would be counter-intuitive for the Commission to find that it does not serve the public interest to subject Verizon's advanced services to price cap regulation pending the outcome of the broadband proceeding, but require Verizon to include its advanced services under price caps to avail itself of pricing relief for these

⁷ 47 C.F.R. § 1.3.

⁸ *EchoStar Communications*, Hearing Designation Order, 17 FCC Rcd 20559 ¶ 94, n. 299 (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

⁹ Verizon Petition for Interim Waiver of Sections 61.42(g), 61.38 and 61.49 of the Commission's rules, 17 FCC Rcd 11010, 11012 (2002).

¹⁰ *Id.*

highly competitive services. Importantly, Verizon is seeking pricing flexibility for its advanced services only in markets where it has already obtained Phase I or Phase II pricing relief. To require Verizon to incorporate its advanced services under price caps and make market-by-market competitive showings for these services in areas where Verizon has already demonstrated that alternative transport exists would seriously undermine the very reason the Commission adopted its pricing flexibility rules in the first place — to eliminate pricing restraints that inhibit a carrier’s “ability to respond to the advent of competition in the exchange access market.”¹¹

Customers would only benefit from a grant of Verizon’s waiver request because they would have even greater options for broadband services. And given that the broadband market is already robustly competitive, the marketplace would serve as an effective watchman to ensure carrier rates, terms and conditions are reasonable. Thus, where a carrier has received pricing flexibility for special access services in a MSA, that flexibility should extend to its advanced services, enabling that carrier to customize its advanced service offerings in response to consumer demand.

¹¹ *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 14 (1999).

For the foregoing reasons, the Commission should grant Verizon's waiver request to permit Verizon and other ILECs to take advantage of pricing flexibility for their advanced services in areas where that carrier has received pricing flexibility for special access services.

Respectfully Submitted,

/s/ Davida M. Grant

Davida M. Grant
Gary L. Phillips
Paul K. Mancini

SBC Communications Inc.
1401 Eye Street, NW
Suite 400
Washington, D.C. 20005
Phone – 202-326-8903
Fax – 202-408-8745

Its Attorneys

August 3, 2004